

121

No. 09-

①

Supreme Court, U.S.  
FILED

081075 FEB 16 2009

In The OFFICE OF THE CLERK  
Supreme Court of the United States

KENNETH McGRIFF,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Second  
Circuit

**PETITION FOR A WRIT OF  
CERTIORARI**

**RICHARD WARE LEVITT**

Counsel of Record

**LEVITT & KAIZER**

148 East 78<sup>th</sup> Street

New York, New York 10075

(212) 737-0400

## QUESTIONS PRESENTED

1. Should the Court grant certiorari or otherwise hold this case in abeyance pending the Court's decision in *Boyle v. United States*, 07-1309 (cert. granted October 1, 2008, oral argument had January 14, 2009) which raises issues substantially identical to that raised herein, i.e. (a) whether an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), requires at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages? And (b) whether, applying the correct definition of "enterprise," the evidence was sufficient to establish the "McGriff enterprise."

2. Should this Court rule that the "Murder for Hire" statute, title 18 U.S.C. § 1958, charged in counts five, six, ten and eleven, violates the commerce clause because it federalizes prosecutions of purely local "murders for hire" that have no connection to interstate commerce other than the intrastate use of a two-way pager device?

3. Does a district court violate a defendant's rights to due process and a fair trial when, presented with solid evidence of possible juror taint, it either refuses to inquire at all (as occurred here with respect to certain evidence of taint) or makes an inquiry that is intentionally limited to avoid learning facts

that might require a mistrial (as it did with other evidence of taint?

***PARTIES TO THE PROCEEDINGS  
BELOW***

Petitioner Kenneth McGriff and United States of America.

## **TABLE OF CONTENTS**

|  |     |
|--|-----|
| QUESTIONS PRESENTED.....               | ii  |
| PARTIES TO THE PROCEEDINGS BELOW ..... | ii  |
| TABLE OF CONTENTS.....                 | iii |
| TABLE OF AUTHORITIES .....             | vii |
| PETITION FOR A WRIT OF CERTIORARI..... | 1   |
| OPINIONS BELOW .....                   | 1   |
| JURISDICTION.....                      | 1   |
| STATEMENT.....                         | 2   |
| Introduction .....                     | 2   |
| REASONS FOR GRANTING THE WRIT .....    | 5   |

I. THE COURT SHOULD GRANT CERTIORARI OR OTHERWISE HOLD THIS CASE IN ABEYANCE PENDING THE COURT'S DECISION IN *BOYLE V. UNITED STATES*, 07-1309 (CERT. GRANTED OCTOBER 1, 2008, ORAL ARGUMENT HAD JANUARY 14, 2009) WHICH RAISES ISSUES SUBSTANTIALLY IDENTICAL TO THOSE RAISED HEREIN, *i.e.* WHETHER AN ASSOCIATION-IN-FACT

ENTERPRISE UNDER THE RICO  
 STATUTE, 18 U.S.C. §§ 1962(C)-(D),  
 REQUIRES AT LEAST SOME SHOWING  
 OF AN ASCERTAINABLE STRUCTURE  
 BEYOND THAT INHERENT IN THE  
 PATTERN OF RACKETEERING  
 ACTIVITY IN WHICH IT ENGAGES?  
 AND (B) APPLYING THE CORRECT  
 STANDARD, WAS THE EVIDENCE  
 SUFFICIENT TO ESTABLISH THE  
 EXISTENCE OF THE "McGRIFF  
 ENTERPRISE.....5

II. THE COURT SHOULD RULE  
 THAT THE "MURDER FOR HIRE"  
 STATUTE, TITLE 18 U.S.C. § 1958,  
 CHARGED IN COUNTS FIVE, SIX, TEN  
 AND ELEVEN, VIOLATES THE  
 COMMERCE CLAUSE BECAUSE IT  
 FEDERALIZES PROSECUTIONS FOR  
 PURELY LOCAL "MURDERS FOR  
 HIRE" THAT HAVE NO CONNECTION  
 TO INTERSTATE COMMERCE OTHER  
 THAN THE INTRASTATE USE OF A  
 TWO-WAY PAGER DEVICE .....9

III. THE COURT SHOULD RULE  
 THAT A DISTRICT COURT VIOLATES A  
 DEFENDANT'S RIGHT TO DUE  
 PROCESS AND A FAIR TRIAL WHEN,  
 PRESENTED WITH SOLID EVIDENCE  
 OF POSSIBLE JUROR TAIN, IT  
 EITHER REFUSES TO INQUIRE AT  
 ALL (AS OCCURRED HERE WITH  
 RESPECT TO CERTAIN EVIDENCE OF

TAINT) OR MAKES AN INQUIRY THAT  
IS INTENTIONALLY LIMITED TO  
AVOID LEARNING FACTS THAT  
MIGHT REQUIRE A MISTRIAL (AS IT  
DID WITH OTHER EVIDENCE OF  
TAINT) .....20

CONCLUSION.....34

APPENDIX

Opinion of the Court of Appeals for the Second  
Circuit, 287 Fed. Appx. 916 (July 24,  
2008)(summary order) .....App. 1

Docket of Order of Court of Appeals for the  
Second Circuit, dated November 20, 2008,  
denying Petition for Rehearing .....App. 7

Docket of Judgment (Mandate) of the Court of  
Appeals for the Second Circuit, dated December  
29, 2008 .....App. 7

## TABLE OF AUTHORITIES

### Cases

|  |            |
|--|------------|
| <i>Boyle v. United States</i> ,<br>07-1309 (Cert. Granted October 1,<br>2008, Oral Arugument Had<br>January 14, 2009)..... | passim     |
| <i>Gregory v. Ashcroft</i> ,<br>501 U.S. 452, 111 S.Ct. 2395,<br>115 L.Ed.2d 410 (1991).....                               | 13         |
| <i>Houston, E. &amp; W.T.R. Co. v. United States</i> ,<br>234 U.S. 342, 34 S.Ct. 833<br>(1914).....                        | 19         |
| <i>Perez v. United States</i> ,<br>402 U.S. 146, 91 S.Ct. 1357<br>(1971).....  | 16, 19     |
| <i>Shreveport Rate Cases</i> ,<br>234 U.S. 342 (1914).....   | 16, 18     |
| <i>Southern R. Co. v. United States</i> ,<br>222 U.S. 20, 32 S.Ct. 2<br>(1911).....  | 16, 17, 18 |
| <i>United States v. Abrams</i> ,<br>137 F.3d 704 (2d Cir.1998).....  | 21         |
| <i>United States v. Bufalino</i> ,<br>576 F.2d 446, (2d Cir.1978).....   | 21         |

|  |                |
|--|----------------|
| <i>United States v. Gaggi,</i><br>811 F.2d 47 (2d Cir.1987).....   | 21             |
| <i>United States v. Lopez,</i><br>514 U.S. 549 (1995).....   | 12, 15, 16, 19 |
| <i>United States v. McGriff</i><br>287 Fed.Appx. 916 (July 24, 2008)<br>(summary order) (Pet. App. 1)..... | 1              |
| <i>United States v. Morrison,</i><br>529 U.S. 598, 120 S.Ct. 1740 (2000).....                              | 15             |
| <i>United States v. Perez,</i><br>414 F.3d 302 (2d Cir. 2005).....   | 12             |
| <i>United States v. Resko</i><br>3F.3d 684 (3d Cir. 1993).....   | 21             |
| <i>United States v. Turkette,</i><br>452 U.S. 576 (1981).....  | 9              |

### Statutes

|                               |           |
|-------------------------------|-----------|
| 18 U.S.C. § 1958.....         | 2, 11, 12 |
| 18 U.S.C. § 1958(a).....      | 11        |
| 18 U.S.C. § 1959.....         | 2         |
| 18 U.S.C. §§ 1962(C)-(D)..... | 5, 6      |
| 28 U.S.C. § 1254(1).....      | 1         |



## ***PETITION FOR A WRIT OF CERTIORARI***

Kenneth McGriff respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

### ***OPINIONS BELOW***

The opinion of the United States Court of Appeals for the Second Circuit in *United States v. McGriff* is at 287 Fed.Appx. 916 (July 24, 2008) (summary order) (Pet. App. 1).<sup>1</sup>

### ***JURISDICTION***

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 29, 2008 (Pet. App. 7). Mr. McGriff's Petition for Rehearing was denied on November 20, 2008. (Pet. App. 7). This petition is timely filed within the 90-day statutory time limitation. This Court has jurisdiction to review the judgment below on a writ of certiorari pursuant to Title 28 U.S.C. § 1254(1).

---

<sup>1</sup> Numbers in parentheses preceded by "Pet. App." refer to the Appendix to this Petition. Those preceded by "Tr." are to the minutes of Petitioner's trial, and those preceded by "A" are to the Appendix submitted to the Second Circuit with Petitioner's brief on appeal.

## **STATEMENT**

### **Introduction**

The charges against Mr. McGriff,<sup>2</sup> stemmed from his alleged leadership of a so-called "RICO enterprise" charged as the "McGriff Enterprise," which was supposedly centered in the Queens, New York neighborhood of Jamaica and sold drugs in various locales, including Baltimore, Maryland. The most serious charges concerned the murders of Eric Smith, a/k/a, "E Money Bags," and Troy Singleton, a/k/a, Big Nose Troy, who allegedly were killed (as variously described by the witnesses) because Smith had assaulted Mr. McGriff's friend Irv Gotti, CEO of the rap music company, Murder, Inc., and/or because Smith had shot and killed Mr. McGriff's friend "Black Just." The jury eventually found that Mr. McGriff was responsible for these murders as "murders for hire" in furtherance of the RICO enterprise under 18 U.S.C. § 1958, but not as murders in aid of racketeering under 18 U.S.C. § 1959. Mr. McGriff was also convicted of various drug-related charges and of conducting unlawful

---

<sup>2</sup> Certain of the witnesses knew Mr. McGriff as "Supreme" or "Preme." For clarity, we will generally refer to him as "Mr. McGriff" or "Petitioner."

money laundering transactions, but was acquitted of several gun charges. The counts of conviction were:

Count One: RICO

Count Two – RICO conspiracy

Count Five – Conspiracy to commit murder for hire (Smith)

Count Six – Murder for hire (Smith)

Count Ten – Conspiracy to commit murder for hire (Singleton)

Count Eleven -- Murder for hire (Singleton)

Count Thirteen – Drug conspiracy

Count Fourteen – Possession with intent to distribute drug

Count Sixteen – Conspiracy to engage in unlawful monetary transactions

Count Seventeen – Engaging in unlawful monetary transactions

The court sentenced Mr. McGriff to life sentences upon his convictions under Counts One, Two, Five, Six, Ten, Eleven, Thirteen and Fourteen of the indictment, as well as ten year concurrent sentences upon his convictions under Counts Sixteen and Seventeen.

The government's case relied principally on the testimony of several cooperating witnesses, evidence seized during a search of a Baltimore, Md. apartment argued by the government to be a "stash house," and pager messages allegedly reflecting communications

between Mr. McGriff and others during the periods when the murder conspiracies were active.

We address the facts relevant to the issues raised in this Petition in their corresponding points below.

## REASONS FOR GRANTING THE WRIT

### I.

THE COURT SHOULD GRANT CERTIORARI OR OTHERWISE HOLD THIS CASE IN ABEYANCE PENDING THE COURT'S DECISION IN *BOYLE V. UNITED STATES*, 07-1309 (CERT. GRANTED OCTOBER 1, 2008, ORAL ARGUMENT HAD JANUARY 14, 2009) WHICH RAISES ISSUES SUBSTANTIALLY IDENTICAL TO THOSE RAISED HEREIN, *i.e.* WHETHER AN ASSOCIATION-IN-FACT ENTERPRISE UNDER THE RICO STATUTE, 18 U.S.C. §§ 1962(C)-(D), REQUIRES AT LEAST SOME SHOWING OF AN ASCERTAINABLE STRUCTURE BEYOND THAT INHERENT IN THE PATTERN OF RACKETEERING ACTIVITY IN WHICH IT ENGAGES? AND (B) APPLYING THE CORRECT STANDARD, WAS THE EVIDENCE SUFFICIENT TO ESTABLISH THE EXISTENCE OF THE "McGRIFF ENTERPRISE"

Pending before this Court is *Boyle v. United States* (cert. granted October 1, 2008, oral argument had January 14, 2009) in which this Court will decide – in a case tried, as was the present case, in the Second Circuit –

whether an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), requires at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages? This issue is substantially identical to that raised by Petitioner before the Second Circuit, titled in Petitioner's brief, "The government failed to prove the existence of the McGriff enterprise." As Petitioner argued in the first paragraph of this point: "The government failed to prove there was a so-called "McGriff enterprise" – unless the definition of "enterprise" has become so diluted that any evidence of multiple instances of drug dealing will suffice."

Given that *Boyle* has already been fully briefed and argued, we provide a summary of the trial evidence and arguments raised by Petitioner in the Second Circuit to demonstrate that the issue presented is identical to that to be decided in *Boyle* and to show that the evidence in Petitioner's case was insufficient as a matter of law to establish the existence of the charged RICO enterprise.

The government's proof, succinctly stated, included the following:

- Michael Hardy, who worked under drug dealer James Mason, testified to two isolated instances when he

met Mr. McGriff. In the first, Todd and Mason picked up a kilogram of heroin from Mason's source, Gloria, and they delivered the drugs to Mason's cousin's house on Sutphin Boulevard. Mr. McGriff arrived with "Baby Wise," entered the house, and then exited with the bag Mason had earlier brought to the house (Tr. 314-17). On the second occasion, Hardy picked up a kilogram of cocaine at Mason's direction and delivered the drugs to Mr. McGriff, who was in the company of "Green Eyes Born" (Tr. 318-21).

- o Terence Terrell, who worked for Baltimore drug dealer Billy Guy, purchased drugs from various people, including Mr. McGriff (Tr. 377-79). Some time in or after April 2001, Guy told Terrell that Mr. McGriff was upset because Guy's brother had run up a \$300,000 debt. Terrell and Guy's girlfriend, Senovia Meyers, would sometimes meet Mr. McGriff at a Bennigans on Security

Boulevard in Baltimore. On one occasion, he was present when Meyers asked Mr. McGriff for more drugs on Guy's behalf, and Mr. McGriff said he would do "this one last thing for Bill" (Tr. 396-97) and provided a half-kilogram of heroin (Tr. 401). Other drug transactions with Mr. McGriff followed (Tr. 398, 402, 406-407).

- The police raided a so-called stash house in Baltimore on August 24, 2001, finding drugs, cutting agents, a gun and other indicia of the illegal drug trade, as well as certain videotapes. Mr. McGriff's fingerprints and other indicia of his presence were recovered (although the jury returned a verdict of "neither" when asked whether the government had "proved" or "not proved" the "stash house" charge in Racketeering Act 2).
- Mr. McGriff's arrest by New York City Police on July 24, 2001, when police observed what they believed was a



marijuana transaction. A gun and cash were recovered from Mr. McGriff, but no drugs (Tr. 211-27).

- o Mr. McGriff's alleged involvement in the murders of Eric Smith, a/k/a "E Money Bags," and Troy Singleton, a/k/a "Big Nose Troy", which were not drug-related but rather — according to witnesses — were catalyzed by the beating of Mr. McGriff's friend Irv Gotti and/or the murder of his friend "Black Just".

On direct appeal to the Second Circuit, petitioner argued that the foregoing evidence, considered together with everything else admitted at trial, did not establish the existence of the so-called "McGriff Enterprise" but rather, at most, suggested Mr. McGriff's episodic involvement with a shifting group of others in drug dealing.

Petitioner went on to argue (though at much greater length than we present here) that a split in the circuits has arisen regarding how much "structure" an organization must have to be a RICO "association in fact" enterprise. This split has arisen from the various interpretations given to this Court's discussion of "enterprise" in

*United States v. Turkette*, 452 U.S. 576, 583 (1981). Several circuits require that the RICO enterprise have an ascertainable structure entirely distinct from the pattern of racketeering activity in which it engages, whereas the Second Circuit has taken a more expansive approach, holding that an enterprise may be proven by reference to its predicate racketeering acts.

The split in the circuit decisions was addressed in the petition for certiorari filed on behalf of the petitioner in *Boyle* and presumably was the reason for the grant of certiorari.

Here, the Second Circuit, in its summary disposition of the case, did not address the definition of "enterprise." Instead, it held merely:

Multiple witnesses testified about their roles in McGriff's drug distribution trade, and their testimony was sufficient for a rational juror to conclude that the government had proven the existence of the "McGriff Enterprise."

(Pet. App 4).

This Court's resolution of *Boyle* may demonstrate that the Second Circuit wrongly decided Petitioner's direct appeal. For this reason we respectfully request, in the alternative, that this Court either grant

certiorari and schedule briefing and oral argument, or hold its decision upon this Petition in abeyance pending its resolution of *Boyle v. United States*, and thereafter grant certiorari and remand the case to the Second Circuit for further consideration in light of its decision in *Boyle*.

## II.

**THE COURT SHOULD RULE THAT THE "MURDER FOR HIRE" STATUTE, TITLE 18 U.S.C. § 1958, CHARGED IN COUNTS FIVE, SIX, TEN AND ELEVEN, VIOLATES THE COMMERCE CLAUSE BECAUSE IT FEDERALIZES PROSECUTIONS FOR PURELY LOCAL "MURDERS FOR HIRE" THAT HAVE NO CONNECTION TO INTERSTATE COMMERCE OTHER THAN THE INTRASTATE USE OF A TWO-WAY PAGER DEVICE**

Title 18 U.S.C. § 1958(a), provides:  
Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder [for hire be committed]... shall be... imprisoned....

The Second Circuit and other courts have interpreted the quoted language broadly, to apply even to purely *intrastate* communications, so long as the chosen "facility" of "commerce" is *interstate*. *United States v. Perez*, 414 F.3d 302 (2d Cir. 2005). Thus, the Second Circuit upheld the application of § 1958 to Petitioner because he allegedly used a two-way pager device that operated on an interstate network even though his communications were local. As interpreted, the statute is unconstitutional, in violation of the commerce clause, because it creates a federal offense for purely *intrastate* activity that has no impact whatever on *interstate* commerce. This Court should now so hold.

When this Court analyzed the Gun-Free School Zones Act in *United States v. Lopez*, 514 U.S. 549 (1995), it began its analysis with "first principles," and so do we:

The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was

adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3....

The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196. The

*Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary."  
"Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one.... The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the

sentence, must be the  
exclusively internal  
commerce of a State.”  
*Id.*, at 194-195.

*Lopez*, 514 U.S. at 552-553.

In both *Lopez*, where the Court declared that the Gun Free School Zones Act exceeded Congress' commerce clause authority, and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740 (2000), where the Court found that the Commerce Clause did not provide Congressional authority to enact the civil remedy provisions of the Violence Against Women Act, it acknowledged that Congress may regulate, under the commerce clause, activity that falls into any of three broad categories: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, ... even though the threat may come only from intrastate activities"; and (3) any "activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-559; *Morrison*, 529 U.S. at 608-609.

The Second Circuit rejected Petitioner's commerce clause argument, because Petitioner used a two-way pager when allegedly planning the charged murders. Such a device, said the court, is a "facility of interstate commerce' that falls within the commerce clause power described by the Supreme Court in *United States v. Lopez*, 514 U.S. 549, 558 (1995)" (Pet. App. 6).



The court went on to explain, "Under our case law, a showing that a regulated activity substantially affects interstate commerce is unnecessary when Congress regulates activity involving an instrumentality or facility of interstate commerce." (Pet. App. 6, citations omitted). This rule applies, said the court, even where the pager use or phone calls are entirely *intrastate*. *Id.* citing *United States v. Perez*, 414 F.3d 302, 305 (2d Cir. 2005) (*per curiam*).

We suggest that this Court, when holding that Congress may regulate "the instrumentalities of interstate commerce, ... even though the threat may come only from intrastate activities," did not intend to extend commerce clause jurisdiction to reach the intrastate use of a wireless pager merely because that pager connects though an interstate network. *Lopez* cites the following three examples of Congressional regulations used "to regulate and protect the instrumentalities of interstate commerce": *Southern R. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2 (1911); *Shreveport Rate Cases*, 234 U.S. 342 (1914); and *Perez v. United States*, 402 U.S. 146, 91 S.Ct. 1357 (1971). In *Southern R. Co.*, the Court addressed the constitutionality, under the commerce clause, of a statute that required "every common carrier 'engaged in interstate commerce by railroad'" to equip all its trains with certain safety features. After finding that the statute was intended to apply even to trains that travel *intrastate*, the Court addressed its constitutionality, framing the issue in terms



of the strength of the connection between the requirements imposed by the statute with respect to intrastate traffic and the object of the act – the safety of interstate commerce:

Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate?

Southern R. Co., supra, 222 U.S. at 26. The Court answered this question in the affirmative, citing several reasons.<sup>3</sup>

---

<sup>3</sup> The Court reasoned:

The *Shreveport Rate Cases*, which upheld orders of the Interstate Commerce Commission regulating intrastate as well as interstate railway rates, highlighted the direct connection between the setting of intrastate rates and Congress's exercise of its constitutional authority to regulate commerce between the states:

Wherever the interstate and intrastate transactions of carriers

---

Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

222 U.S. at 27.

are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field.

*Houston, E. & W.T.R. Co. v. United States*, 234 U.S. 342, 351-352, 34 S.Ct. 833 (1914).

The third case cited by the Court in *Lopez* as an example of Congress' authority "to regulate and protect the instrumentalities of interstate commerce," *Perez v. United States*, upheld that portion of the Consumer Credit Protection Act prohibiting "loan sharking" activities regardless whether particular activities had an interstate nexus. There, the Court upheld the prohibition because extensive Congressional findings supported the conclusion that extortionate credit transactions, "though purely intrastate," may affect interstate commerce. 402 U.S. at 154.

These three cases reflect an understanding of Congressional authority to regulate *intrastate* activity that affects *interstate* commerce. We are aware of no case decided by this Court that extends commerce clause jurisdiction to a purely *intrastate* and incidental use of a facility of interstate commerce that in

fact has no affect on interstate commerce, and we respectfully suggest that the Second Circuit's extension of the commerce clause to such a scenario is anathema to the Founding Fathers' intended restriction of federal commerce clause jurisdiction. Accordingly, the Court should grant certiorari to discuss this important issue of federal criminal jurisdiction.

### III.

**THE COURT SHOULD RULE THAT A DISTRICT COURT VIOLATES A DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN, PRESENTED WITH SOLID EVIDENCE OF POSSIBLE JUROR TAINT, IT EITHER REFUSES TO INQUIRE AT ALL (AS OCCURRED HERE WITH RESPECT TO CERTAIN EVIDENCE OF TAINT) OR MAKES AN INQUIRY THAT IS INTENTIONALLY LIMITED TO AVOID LEARNING FACTS THAT MIGHT REQUIRE A MISTRIAL (AS IT DID WITH OTHER EVIDENCE OF TAINT)**

Surprisingly, this Court has never provided guidance regarding a trial court's appropriate response where it receives evidence of possible juror taint or misconduct. Additionally, no cohesive rule has emerged from the Circuit Courts of Appeal, which generally approach such issues on an *ad hoc* basis, applying little more than a general rule that a court has broad discretion concerning how to

proceed in the face of possible juror taint. As the Second Circuit said in affirming Petitioner's conviction, "[A] trial judge's handling of alleged juror misconduct or bias is only reviewable for abuse of discretion." 287 F.3d at 918, quoting *United States v. Bufalino*, 576 F.2d 446, 451-52 (2d Cir.1978) (internal quotation mark omitted); see also *United States v. Abrams*, 137 F.3d 704, 708 (2d Cir.1998) (per curiam); *United States v. Gaggi*, 811 F.2d 47, 51 (2d Cir.1987). And although incidents of such possible taint are numerous, few of them are found to require relief. E.g., *United States v. Resko*, 3F.3d 684 (3d Cir. 1993) (new trial granted because district court's inquiry into possible premature deliberations was inadequate). The failure of the Circuit Courts of Appeal to develop uniform, workable rules for addressing possible juror taint, considered together with the frequency with which such issues arise, evidence a critical need for this Court to finally address the issue.

Early in the course of jury deliberations in this case, the trial court was informed that Juror # 12 (the jurors were anonymous and therefore identified only by number) had written a note stating she recognized someone in the courtroom "connected with the Supreme Team" [i.e. the charged enterprise] who "knows where I live" (1882). The court immediately expressed its inclination to proceed with an 11-juror deliberation under Fed.R.Crim.P. 24, and that "[o]ne choice will not be a mistrial, as long as this person did not express any fear to

*the other jurors*" (1884) (emphasis added). The court's stated goal – to avoid a mistrial – informed its subsequent decisions regarding the juror's note. Eventually the court interviewed each juror, but the interviews were perfunctory – calculated more to advance the court's stated goal of reaching a verdict than to determine whether other jurors were tainted. Even these truncated inquiries, however, revealed the existence of the condition precedent that the court earlier said would require a mistrial: Juror # 12 in fact had "express[ed]... fear to the other jurors." Eventually Juror # 12 as well as Juror # 6 – who also had seen someone he recognized and expressed fear of continued participation in deliberations – were excused. Alternates # 1 and # 2 were seated and the deliberations began anew, with the jury eventually reaching a verdict. Yet the record reveals that the *voir dire* conducted by the court was inadequate – and calculatedly so – to determine whether the jury was tainted by Juror #12's histrionics. Additionally, the court declined to inquire at all regarding other irregularities that reflected the likelihood of juror taint.

We do not address in detail the court's interviews with the various jurors in response to Juror # 12's expressions of fear, and the district court's many expressions of unwillingness to dig below the surface to determine whether one or more jurors besides Juror # 12 and Juror # 6 were irreparably tainted. For purposes of this Petition, however, we observe the following:



When the district judge finally agreed to interview the jurors, Juror # 12 first entered chambers.<sup>4</sup> The court observed she was "crying now" (Tr. 1888). She explained she knew the "guy that was sitting in the second row, third seat" and identified him as "Shaquia" (ph) (Tr. 1888). The court requested the presence of a marshal and, while waiting, commented to the juror about her and the jury's diligence, saying, "Nobody ever said this was going to be easy" (Tr. 1889). The juror replied, "No, sir, it's not. *We're about to kill each other*, but we're doing all right" (Tr. 1889, emphasis added).

After a marshal entered the room, Juror # 12 explained, "He's sitting in the second row, third seat. His name is Shaquia. I don't know his last name." He was seated on the side "reserved for Mr. McGriff's family and friends" (Tr. 1890). The juror knew Shaquia from the time she attended an all girl high school. At one point, Shaquia told her he was "thinking of joining the Supreme Team" as a body guard, and she had asked him why he would do such a thing (Tr. 1890). She didn't know whether he in fact had joined, but knew he had spent several years in prison. She expressed concern that "He knows where I live, he knows my family, he knows

---

<sup>4</sup> Defense counsel stated that Mr. McGriff, who was present during these proceedings, had stated "the atmosphere might be improved if he were not present, and if this juror is feeling at all pressured." (1886). Mr. McGriff therefore voluntarily absented himself.

everything about me" (Tr. 1891). She said she saw him in court for the first time, "Just today" (Tr. 1892).

The court asked Juror # 12 whether she had "said anything about this to any of the other jurors"? She replied, "Yes, I freaked out, yeah" (Tr. 1893). She explained she told them "there was someone that I knew who could have been a member of the Supreme Team" and was in the court (Tr. 1894). She was "visibly shaken, so they knew" this scared her (Tr. 1894). She agreed she was "fearful" and didn't "want to serve anymore" (Tr. 1895).

After Juror # 12 left the room, the court said, "obviously, she can't continue to serve" and that its inclination was to continue with a jury of 11 (Tr. 1896). Defense counsel said it was imperative to speak individually with the other jurors. Responding to counsel's suggestion that they "[r]econvene in an hour or so, to permit further reflection, the court said the jury should "continue to deliberate. Because there's no question in my mind that we're going to continue with the jury of 11. I'm making that determination" (Tr. 1898). The court's clerk then reported that "upon going into the jury room to pull out Juror Number 12, she was visibly upset, and several jurors were around her comforting her" (Tr. 1900). The court then said, "I understand that we'll probably talk to all the jurors" (Tr. 1900).



Juror # 12 was then brought back into chambers. The court explained it wanted to make sure "you have told me everything that you said to the jurors" and commented "I take it, from what you told me, they saw you were emotionally upset?" The juror agreed and said "I mentioned his name. I know Shaquia, you know" (Tr. 1902). She said she "told the juror sitting next to me in the courtroom, I just said, 'I know that guy in the second row'" and that all the jurors now knew this (Tr. 1903). She explained that, while in the courtroom, she had whispered to the court's deputy, Mike, that "I know someone" and Mike told her to write a note. She wrote the note in the jury room and other jurors asked her if she was certain and she responded, "I'm very sure. His name is Shaquia. I have known him since I was young" (Tr. 1904). Answering a question of defense counsel, Juror # 12 said, "I might have said [to the other jurors] that he might have thought of joining [the Supreme Team], but I don't know if I said he is a member. I don't know if he's a member, so I know I didn't say he's a member, but I might have said he thought about it." *Id.* She further explained that she is not afraid of Shaquia since he is a friend, but "can he relay the message to anyone else that where I live, so forth and so on? He has that information" (Tr. 1905). She added: "And my personal opinion I feel they're fresh faces every day, and they're just there to look for us. It only benefits McGriff to have an open court in my opinion" (Tr. 1905).

Answering defense counsel's question whether she "or other members of [the jury] think people are trying to find out who the jurors are" Juror #12 said, "There's a certain level of nervousness on and off. Some days are better than others" (Tr. 1905-06). The prosecutor then interjected, "Judge, I won't get into this" and the court agreed, saying, "I don't want to get into this either. I'll explain that to you at the proper time" (Tr. 1906). Juror # 12 was then excused.

The court then pondered whether to speak with the other jurors individually. The government agreed the court should speak with the jurors, a sentiment the Assistant repeated after the lunch recess (Tr. 1909). The court said it was inclined to proceed with an 11-person jury rather than begin deliberations anew with an alternate juror (Tr. 1910). Defense counsel reiterated the need to question each juror individually and the court opined that "*Well, if I question them individually, we're going to wind up with a mistrial*" and added, "I can make a general statement to them, and then invite them to speak to me, if they wish to do so..." (Tr. 1913, emphasis added). Defense counsel said it was necessary "to know what exactly took place and what was observed to have taken place by the individual jurors" (Tr. 1914). The court repeated that if it engaged in the thorough inquiry defense counsel requested "*then we'll have a mistrial by the end of the day, and we'll just start this case all over again. That's what's going to happen.*"

*Again, I'll tell you - oh, there is no question that one out of 11 will say things which will be alarming, which will be of concern, which will cause a mistrial"* (Tr. 1914-15, emphasis added). Defense counsel observed there were still three alternate jurors and emphasized the importance of individual voir dire (Tr. 1915). The court lamented that "If I ask 11 people what happened, I'm going to get 11 different versions" (Tr. 1916).

The court finally agreed it would "call them in each individually, but made clear it would tightly control what questions were asked, saying, "I'm going to ask the questions. I'm not going to invite you to question at all... Let's just try to play it by ear and see how it goes." (Tr. 1920-21). The jurors were then called into chambers one-by-one. The court asked each juror whether he or she was in fear, but declined to ask what occurred in the jury room and to follow up on statements by the jurors that they were afraid. Thus, when defense counsel asked the court to follow up on Juror # 2's statement that she was afraid (Tr. 1929) the court responded, "I understand you have your exceptions, and if you want to try the case again, we'll do it, but I'm not going to push this to a point where you could create unnecessary problems. I'm satisfied from what I heard that she could continue. She said she was afraid from the beginning. Nothing else happened. I know you want to elaborate... I'm not going to do it." (Tr. 1930). Defense counsel responded, "When

finding out the truth becomes a problem, then we're lost" (Tr. 1930). After Juror # 3 said she remained fearful, defense counsel reiterated that the manner of inquiry was "a problem," and the court responded, "You can get another trial if the Second Circuit Court wants to give it to you..." (Tr. 1934).

Juror # 6 (who was eventually discharged) related that a woman in the audience he knew from his previous employment at a bowling alley was pointing at him in the courtroom, a fact he confirmed with Juror # 11 (Tr. 1945). He said he wrote a note to "Mike," the judge's courtroom deputy, to give to the judge, but the note never surfaced; during a sealed conference on Wednesday, January 31, 2007 (since unsealed), the court, responding to a letter from defense counsel, said neither it nor the court's deputy were aware of such a note. The stark contradiction between Juror # 6's unequivocal claim that he gave the note to the deputy, and the deputy's denial of receiving it, was never reconciled (Pet. App. 4-5; see A. 60).

Juror # 9 said she was aware of Juror # 12's expressions of fear but said it would not affect her (Tr. 1954). She was interviewed *in camera*, however, shortly after the guilt phase verdict was returned, because she expressed concern that, on the previous day, two persons she had seen in the courtroom looked into the van that was transporting her and her fellow jurors home (A. 55). As reflected in the sealed transcript of the interview (since unsealed), the

juror said, "We were just worried" and asked whether the van could "take[] a different route today..." (A. 56). Counsel for the government and Petitioner were not present during this interview, but were thereafter told by the court what occurred. The court, however, did not inform the attorneys that the juror had also said "*We were just worried*" (A. 56, emphasis added), and counsel therefore did not possess information critical to assessing whether this juror should be re-interviewed or be made the object of a discharge motion.

Defense counsel objected, again, after the interviews of both Juror # 10 and Juror # 11 to the lack of follow-up in the court's questioning (Tr. 1959-60), and the court's failure to ask what actually took place in the jury room. Defense counsel argued that the court needed to ask "how did this make you feel? What happened next? What else did you see? How [were] the jurors behaving themselves? (Tr. 1959-60, 1963-64). The court said it would recall Juror # 11 but that "We're getting close to a mistrial, just so you know. I'll ask one or two questions. We'll talk to Juror Number 2 again and Number 6, and see how it goes" (Tr. 1964). When Juror # 11 was questioned again she said she was not concerned, though, she said, Juror # 6 *was* concerned.

Juror # 11's service was addressed again during a sealed (now unsealed) conference on January 31, 2007. As revealed during the conference, Juror # 11 (initially misidentified in

the transcript as Juror # 12) had asked the court's deputy - previous to deliberations - whether the deputy could determine for him whether he could "find out what church Mrs. Singleton [mother of shooting victim Troy Singleton] had gone to" (A. 62). The clerk told the juror he would "find out" and thereafter referred the question to AUSA Jones. AUSA Jones thereafter provided the deputy the requested information, but the deputy did not communicate it to the juror (A. 63-64). Defense counsel learned of these events after they occurred during casual conversation with the AUSA. Defense counsel asked the court to "ask juror number 11 if he knows - if he thinks he knows - Mrs. Singleton" (A. 64). The court denied the request, stating, "If the circuit wants to look at the totality of this case and come to the conclusion that the jurors have been tainted let them try the case again, but I am not going to do that" (A. 65). *Thus no inquiry at all was made regarding why Juror # 11 made this request, or whether she knew the mother of Troy Singleton, or what effect, if any, this had on her participation in the deliberations.*

Juror # 6 was eventually re-questioned, and said he was now "very concerned." The juror elaborated: "When I was selected for jury duty, I wasn't aware of how high profile this case was, and hearing about the possibility of McGriff paying somebody \$25,000 to kill somebody two years later. I'm no different than those two guys



that got killed, and I don't want to read about in the newspaper in 2009, you know." The juror expressed concern that the woman in the audience "definitely recognized me" (Tr. 1967). He added that he had not told other jurors that he was "afraid that they could come and get" him, but had "said I was concerned for my safety" (Tr. 1969-1970). However, he did speak with Juror # 11, who "knows exactly" how he felt (Tr. 1970).

After discussion between the court, the attorneys and the clerk, and efforts to reach the alternates so they could come to court after the weekend, the parties resumed the proceedings in open court (Tr. 1979). The court explained that Juror # 6 and Juror # 12 had been excused and that deliberations would be recommenced the following Monday with two alternates (Tr. 1980). After admonishing the jury not to review anything regarding the case in the media or on the Internet, the court told the jurors: "Because if the case has to be retried, you know, it will be obviously a big expense to all of us, and you can understand how we don't want to do that, unless we absolutely have to, so, just keep up the good work" (Tr. 1981).

The following Monday, January 29, 2007, the court and the attorneys discussed how the jury would begin its deliberations anew with the two alternates. A sealed discussion took place at 1993-2006 (since unsealed), during which the court spoke with the alternate jurors before

seating them. The court then brought the jury into the courtroom and explained they would deliberate anew with the two alternates after cleansing the jury room of documents they did not have at the commencement of deliberations (Tr. 2008-2009). The court thereafter – at 10:35 a.m. – returned the jury to the courtroom and added the two alternates to the jury. Deliberations then re-commenced (Tr. 2016).

\* \* \*

Certiorari should be granted for this Court to address a defendant's due process and fair trial rights in the face of possible juror taint and the appropriate procedures that should be followed to safeguard those rights. Here, in addition to the inadequacy of the court's inquiry regarding whether other jurors were tainted by the events that led to Juror # 12's removal, *the following circumstances were not addressed at all.*

1. Whether the remaining jurors – particularly Juror # 11 who knew “exactly” how Juror # 6 felt – were tainted by Juror # 6's expressions of fear;

2. The mysteriously lost note that Juror # 6 insisted he wrote to Mike to give to the Judge but which Mike and the judge denied ever seeing, which may or may not have reflected information important to the taint issue; and

3. The “worry” expressed by Juror #9 on behalf of herself and other jurors during the



court's *in camers* interview with Juror #9, after two persons she had seen in the courtroom peered into her van. The court informed counsel of the interview but did not inform counsel that Juror #9 said she and other jurors were "worried (A. 55-56).

Certainly a court may not – consistent with a defendant's due process and fair trial rights – simply ignore these matters, yet that is precisely what the trial court did. And it made no bones about its general approach to the juror issues that arose in this case; it intended to avoid any inquiries that might precipitate a mistrial.

The Second Circuit in its opinion affirming Petitioner's conviction did not address any of the three points noted immediately above, but rather concluded, generally, that the district court did not abuse its discretion because, other than Jurors 6 and 12, the balance of the jurors said they were "unaffected and still willing and able to deliberate fairly and impartially," and that their self-assessments "were consistent with the District Court's observation that "[t]hese folks have been pretty consistently calm. Nobody has shown any emotional reaction here, from my observations" (Pet. App. 5).

The Second Circuit's opinion simply ignored the most critical failings of the district court in (1) failing to delve beyond the jurors' conclusory self-reports; and (2) failing to address

*at all* the three additional circumstances enumerated above suggesting the possibility of juror taint. The Second Circuit's inadequate analysis combined with the lack of guidance by this Court regarding the proper approach to handling issues of possible juror taint, highlights the need for the Court's guidance in this most sensitive area.

### *Conclusion*

For the foregoing reasons, the Court should issue a writ of certiorari to review Petitioner's conviction and sentence.

Dated: New York, New York  
February 13, 2009

Respectfully submitted,

Levitt & Kaizer, Esqs.  
148 East 78<sup>th</sup> Street  
New York, N.Y. 10075  
(212) 737-0400

by:

---

Richard Levitt (RL9177)

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 31.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 31.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA1.USCOURTS.GOV](http://www.ca1.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of July, two thousand and eight.

Present:

Hon. Jon. O. Newman

Hon. Guido Calabresi

Hon. Barrington D. Parker

Circuit Judges

---

UNITED STATES OF AMERICA,

Appellee-Cross Appellant, 07-1371-cr (L),  
07-1626-cr (con)

v.

KENNETH McGRIFF,

Defendant-Appellant-  
Cross-Appellee.

---

For Defendant-Appellant-Cross-Appellee:

Richard Ware Levitt  
New York, New York

For Appellee-Cross-Appellant:

Carolyn Pokorny, Assistant  
United States Attorney

App. 3

(Susan Corkery and Jeffrey  
Rabkin Assistant U.S.  
Attorneys, on the brief) for  
Benton J. Campbell, United  
States Attorney for the  
Eastern District of New York,  
New York.

AFTER ARGUMENT AND UPON DUE  
CONSIDERATION of this appeal from a  
judgment entered in the United States District  
Court for the Eastern District of New York  
(Block, J.), it is hereby ORDERED, ADJUDGED,  
AND DECREED that the judgment of the  
district court is AFFIRMED.

Kenneth McGriff appeals his conviction  
for a variety of racketeering and conspiracy  
offenses involving drug distribution and murder-  
for-hire. He argues that the convictions were  
based on insufficient evidence, and that the  
anonymous jury that convicted him was tainted  
after two jurors recognized people they knew in  
the courtroom, expressed their fears to the rest  
of the jury, and were removed.

"A defendant challenging the sufficiency of  
trial evidence bears a heavy burden, and the  
reviewing court must view the evidence  
presented in the light most favorable to the  
government and draw all reasonable inferences  
in the government's favor." *United States v.*

*Gagliardi*, 506 F.3d 140, 149 (2d Cir. 2007)(internal quotation marks omitted)(quoting *United States v. Giovanelli*, 464 F.3d 346, 349 (2d Cir. 2006)(per curiam), *cert. denied*, 128 S.Ct. 206 (2007)). Thus a jury verdict must be affirmed unless “no rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt.” *Gagliardi*, 506 F.3d at 149-50 (internal quotations omitted).

McGriff cannot meet this high burden. Multiple witnesses testified about their roles in McGriff's drug distribution trade, and their testimony was sufficient for a rational juror to conclude that the government had proven the existence of the “McGriff Enterprise.” It is a closer question whether the murders of Eric Smith and Troy Singleton were horizontally and vertically related to that enterprise, as required to show a pattern of racketeering activity. *See, e.g., United States v. Daidone*, 471 F.3d 371, 376 (2d Cir. 2006). But the record contains direct and sufficient testimony that McGriff ordered the murders not simply for revenge or personal self-aggrandizement, but to re-establish and maintain the reputation of his enterprise after Smith and Singleton disrespected him. That reputation, in turn, was important to the strength of the enterprise—indeed, McGriff was able to obtain drugs on credit based on the strength of his reputation. The direct testimony of those involved in McGriff's enterprise was therefore sufficient to link the murders to the goals of the enterprise itself.

McGriff's next argument is that the District Court failed to conduct a sufficient *voir dire* of the jurors following revelations that two of them had recognized people in the courtroom and were frightened. McGriff argues that this fear tainted the jury, and that a mistrial should have been declared. "[A] trial judge's handling of alleged juror misconduct or bias is only reviewable for abuse of discretion." *United States v. Bufalino*, 576 F.2d 446,451-52 (2d Cir. 1978) (internal quotation mark omitted); *see also United States v. Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) (*per curiam*); *United States v. Gaggi*, 811 F.2d 47,51 (2d Cir. 1987). The District Court did not abuse that discretion here. After Juror 12 expressed fear-both to the court and to her fellow jurors-upon seeing an old acquaintance in the courtroom, the District Court conducted an individual *voir dire* of each juror. All except for Juror 6-who also said he recognized someone in the courtroom and was frightened-said that they were essentially unaffected and still willing and able to deliberate fairly and impartially. The jurors' self-assessments in this regard were consistent with the District Court's observation that "[t]hese folks have been pretty consistently calm. Nobody has shown any emotional reaction here, from my observations." In these circumstances, the District Court did not abuse its discretion by dismissing Jurors 6 and 12 and ordering the remainder of the jury to return to deliberations.

Finally, McGriff challenges the



constitutionality of the federal murder- for-hire statute, 18 U.S.C. § 1958, which he says violates the Commerce Clause. This claim must fail because McGriff planned and coordinated the murders of Smith and Singleton using a two-way pager, which is itself a "facility of interstate commerce" that falls within the Commerce Clause power described by the Supreme Court in *United States v. Lopez*, 514 U.S. 549, 558 (1995) (identifying "instrumentalities of interstate commerce" as one of the "three broad categories of activity that Congress may regulate under its commerce power"). Under our caselaw, a showing that a regulated activity substantially affects interstate commerce is unnecessary when Congress regulates activity involving an instrumentality or facility of interstate commerce. *United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002); *see also United States v. Perez*, 414 F.3d 302, 305 (2d Cir. 2005) (per curiam) ("[E]ven though Perez's calls to Casiano were wholly intrastate communications, the fact that they were made using the SNET network, a facility involved in interstate commerce, leads us to conclude that Perez was properly subject to prosecution for using interstate commerce facilities in the commission of murder- for-hire.").

For the foregoing reasons, we AFFIRM the judgment of the District Court.

App. 7

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

By: \_\_\_\_\_/s/\_\_\_\_\_

**General Docket**  
**U.S. Court of Appeals for the Second Circuit**  
**Court of Appeals Docket # 07-1731-cr**

**USA v. Robinson (McGriff)**

**Appeal From: EDNY (BROOKLYN)**

**11/20/08 Order FILED DENYING**  
**Petition for rehearing by Appellant Kenneth**  
**McGriff, dated 8/7/2008, Order FILED**  
**DENYING petition for rehearing en banc by**  
**Appellant Kenneth McGriff, dated 8/7/2008**  
**[Entry date Nov 21 2008] [RO]**

**12/29/08 Judgment MANDATE**  
**ISSUED. CLOSED [Entry date Dec 29, 2008]**  
**[RO]**